

Response by the Human Rights and Social Justice Forum to the Human Rights Act Reform: A Modern Bill of Rights Open Consultation

Newcastle Law School, Newcastle University

Contact: Conall.Mallory@newcastle.ac.uk

or Kathryn.Hollingsworth@newcastle.ac.uk

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1. About the respondent

- 1.1. The Human Rights and Social Justice Forum is a research group of Newcastle Law School. Its membership is drawn from Newcastle University (primarily Newcastle Law School) and other academic and non-academic institutions. The Forum is a member of the Association of Human Rights Institutes (AHRI).
- 1.2. The members who contributed to this consultation response are active researchers who have collective experience acting in advisory capacities to Parliament, governmental and non-Governmental bodies, the judiciary (domestic and overseas) and international organisations including the United Nations. The names of the individuals who contributed to this response are listed in Appendix G.
- 1.3. Some members of the Forum have been involved in lawful industrial action during February and March 2022, called in response to severe cuts to the pensions of those in the USS pension scheme, and to the low pay, pay inequality, workloads and precarity across the Higher Education sector. We have therefore been unable to address all the questions in the consultation due to a reduction in available time. **Unanswered questions should not be taken as an endorsement of the proposed changes.**
- 1.4. Our response has three further parts: preliminary observations and overall conclusions; executive summary; and appendices. The appendices comprise of the detailed responses of individual members of the forum to questions which align with their specific areas of expertise. Summaries of the individual contributions are included within the executive summary.
- 1.5. We would like to express our thanks to Samantha Johnston, doctoral candidate at Newcastle Law School, for her invaluable assistance in drafting our response.

2. Preliminary Observations and Overall Conclusions

- 2.1. Overall, **we do not support** the replacement of the Human Rights Act 1998 (HRA) with a Bill of Rights. This conclusion is based on our academic expertise, and on our collective experience working with practitioners, policy makers and the third sector. **Our engagement with the specific consultation questions should not, therefore, be taken as an endorsement of a Bill of Rights that substantively alters the existing framework for human rights protection in the UK.**
- 2.2. We note that in its 2019 Manifesto, the Conservative Party proposed to ‘*update the Human Rights Act*’ (emphasis added - *The Conservative and Unionist Manifesto*, p48). The current **Government does not, therefore, have a mandate from the electorate to repeal and replace the Human Rights Act 1998.** As such, the House of Lords are not bound by the Salisbury convention and may seek to oppose any legislation which attempts to repeal the Human Rights Act 1998.
- 2.3. We note that many of the questions asked in the consultation are insufficiently open-ended and are premised on a starting point that reform is necessary. We do not accept this and note that the case for reform set out in the consultation document is largely based on theoretical problems rather than realised issues. Our engagement with the questions in the Executive Summary and in the appendices, should not therefore be taken as an endorsement of the need to reform.
- 2.4. The Independent Human Rights Act Review (IHRAR) was established to consider the framework of the HRA, how it is operating in practice and whether any change is needed (<https://www.gov.uk/guidance/independent-human-rights-act-review#about-the-independent-human-rights-act-review>). The IHRAR made recommendations only for modest amendments to the current structure of the HRA. For example, on theme one of the terms of reference it concluded that its recommendations ‘*reinforc[e] the foundation domestically for the HRA’s settled acceptance . . .*’ (emphasis added, Executive Summary, para 41); and that in relation to section 3 HRA ‘*there is no substantive case for its repeal or amendment other than by way of clarification*’ (Executive Summary, para 45). We note therefore that the **Government has failed to adequately engage with the findings and recommendations of the Independent Review** that it established. Given this, **we question whether the Government has come to the current consultation with an open mind.**
- 2.5. We note that the review intends to draw a ‘sharper focus’ on fundamental rights; thus implying a distinction between ‘fundamental rights’ and other rights (or cases where

there has been a ‘genuine harm’ or loss). Within the context of the rights currently protected under the ECHR (as incorporated into domestic law in the HRA), we reject this distinction and the distinction between negative and positive obligations upon which it is based.

2.6. We also reject the attempt to limit or restrict rights on the basis of an individual’s prior behaviour. As the Government rightly notes ‘human rights are universal’ (Executive Summary, para 131). The Government therefore wrongly conflates the wider public interest and the individual’s ‘personal responsibility’ (or behaviour) and presents both as justifications for the legitimate restriction of a qualified right. Under the ECHR, the legitimate aims that can justify restricting a qualified right are carefully and narrowly defined. Altering this within a British Bill of Rights to allow a consideration of an individual’s prior behaviour undermines the very premise of universal rights protection and would place the UK’s framework in conflict with its international obligations.

3. Executive Summary

Condensed Responses to Selected Questions

<p>Question 1 (see further the submission from Dr Hélène Tyrrell, Appendix A)</p>	<p>Domestic courts are already able to draw on a wide range of law. For example, research data from the first eight years of the jurisprudence of the UK Supreme Court demonstrates that the Court makes frequent reference to the jurisprudence of foreign domestic courts.</p> <p>Option 1 – If the rights protected in domestic law differ in significant ways from those under the European Convention on Human Rights (ECHR), there may be an increase in applications to the European Court of Human Rights (ECtHR) against the UK. A broad alignment between the ECHR rights and domestic rights would reduce this possibility and best ensure that the UK acts compatibly with its international human rights obligations. The current structure of the HRA incorporates the ECHR and places an obligation on the courts to ‘have regard’ to jurisprudence of the ECtHR. This allows for that alignment whilst also enabling divergence where necessary to reflect the domestic context. Proposed subsections 4 and 5 are superfluous as they restate the current position. Subsection 6 also restates the current position, but concern is raised over the need to highlight that courts do not need to follow ECtHR judgments.</p> <p>Option 2 – Largely restates the current law. A number of the paragraphs have no legal significance and instead could be seen as mere political posturing. Although this option is preferred, the</p>
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	<p>emphasis on the preparatory materials should be removed as it places too much weight on rights as they were understood over 70 years ago. This is incompatible with the Government's intention to create a 'modern' Bill of Rights. Instead, a 'living-tree' approach should be adopted.</p>
<p>Question 2 (See in particular submission from Dr Hélène Tyrrell, Appendix A)</p>	<p>The UK Supreme Court <i>is</i> the ultimate arbiter of the law/rights in the UK. There is no need to include anything on this in legislation.</p>
<p>Questions 4 and 5</p>	<p>Courts, by necessity, will be the final adjudicator on the balance to be struck between competing freedoms of expression and between freedom of expression and private and family life (<i>Sussex v MGM</i>; <i>Campbell v MGN</i>; <i>CTB v NGN</i>) or other rights (<i>Venables v NGN</i>).</p> <p>Any strengthening of freedom of expression should be a separate legislative matter, rather than a reform of the HRA. It is necessary to ensure the protection of the rights of those whose rights may be impinged by the freedom of expression of others.</p>
<p>Questions 8 and 9 (See in particular, submission from Dr Tanya Krupiy, Appendix B)</p>	<p>The proposed admissibility test's "significant damage" requirement is problematic because it will create difficulty and hardship for individuals in vindicating their human rights. The level of harm from a human rights infringement is not always possible to prove or test at the permission stage. There are also concerns that it will be prohibitively expensive for individuals to bring a claim due to having to satisfy the admissibility test. We do not support an additional permission stage.</p>
<p>Question 10</p>	<p>This forum does not accept the distinction between 'genuine' human rights cases and other human rights cases. Any breach of a human right constitutes a 'genuine human rights' case. Vindictive and spurious complaints can already be struck out. It is not an 'abuse of process' for a victim to raise a complaint against the state.</p> <p>Should changes be made going beyond the admissibility criteria in Strasbourg there is a risk of infringing the right to an effective remedy under Article 13 ECHR.</p>
<p>Question 12 (see in particular, submission from Dr Sean Molloy), Appendix C</p>	<p>There is no basis for reforming section 3 of the HRA. The case for reforming section 3 HRA mirrors much of the Government's proposals in that they are based on theoretical problems rather than realised issues. Indeed, the IHRAR noted that the 'high-water mark of alarm as to the use of section 3 hinges on a case now 20 years old' (p.198). The presentation of two options for reform rests on an initial acceptance of the problems posed by the provision. However, the foundations for reform are not substantiated. On the contrary, the Joint Committee on Human Rights (JCHR), IHRAR and a range of scholars all refute the basis upon which the proposed reforms are made. There are four main problems with the proposals relating to section 3:</p>

	<ol style="list-style-type: none"> 1) The notion that courts, in interpreting legislation in Convention-compliant ways, is an affront to parliamentary sovereignty overlooks the fact that it is often wholly logical to assume that Parliament intended for legislation to be human rights compliant (also noting the requirement for a statement about the compatibility of proposed legislation per s.19 HRA 1998). 2) The proposed reforms also overlook the limitations of the interpretive power under s.3 – Convention-compliant interpretations are permitted if “possible” and not against the thrust of the legislation. 3) Research has found that when section 3 was decisive in a case outcome its use has not been radical. Judges have been conscious of aligning interpretations with Parliament’s intentions. 4) The risk of the ECtHR and its expansive interpretation of rights is overstated. Under the margin of appreciation, the Court has showed a level of deference to nation states particularly when they weigh competing public and individual interests, in view of their special knowledge and responsibility under domestic law.
<p>Question 15 (see in particular, submission from Dr Hélène Tyrrell, Appendix A)</p>	<p>Courts are already able to make declaratory orders in respect of secondary legislation. It is unnecessary to extend the discretion to make declarations of incompatibility and courts should certainly not be limited to only making declarations of incompatibility in respect of secondary legislation that cannot be read compatibly with Convention rights. This proposal would limit the ability of courts to provide remedies for violations of Convention rights and would create inconsistency between secondary legislation that is unlawful due to a rights infringement, and that which is unlawful for other reasons (that is, under the common law principles of judicial review). Further, there is a risk of creating disparities between secondary legislation passed by Ministers in Westminster and the primary legislation passed by the devolved legislatures (which can be quashed on the basis of incompatibility with the ECHR).</p>
<p>Question 16 (see in particular, the submission from Dr Hélène Tyrrell, Appendix A)</p>	<p>There may be a case for adding to (rather than substituting) the remedial options available to courts. The availability of suspended and prospective quashing orders would recognize the fact that third parties may rely on delegated legislation and that the consequences of quashing such legislation may be significant. Nevertheless, the courts are already careful in such cases. A quashing order is a discretionary power. Courts already can and do sometimes choose to make a declaratory order in respect of secondary legislation, leaving it to the government to exercise judgement about the best way to respond.</p>
<p>Question 19 (see in particular the submission from Colin Murray Appendix D)</p>	<p>The extent of the human rights obligations within Northern Ireland law is not purely an outworking of the incorporation of the ECHR under the Human Rights Act; the UK Government committed to a broad measure of ECHR incorporation into</p>

	<p>Northern Ireland law in the Belfast/Good Friday Agreement 1998. This is of foundational importance to an operative democratic constitutional order in Northern Ireland. It is not possible to restrict the operation of these rights within Northern Ireland law without calling into question the UK's commitments under the 1998 Agreement. As the Brexit negotiations illustrate, a principle of non-diminution of rights commitments operates.</p> <p>The suggested options for the replacement of section 3 of the HRA restrict an already limited power to remedy breaches of the incorporated ECHR rights to such an extent that it undermines the role of the courts envisaged in the 1998 Agreement. The scope of the obligations upon the devolved institutions contained in the devolution legislation is explicitly connected to the ECHR rights as incorporated by the Human Rights Act. Any modification of that Act therefore requires amendments to the devolution legislation which would ordinarily require Legislative Consent Motions to be passed in the devolved legislatures. In the Northern Ireland context, this would raise particular difficulties in terms of the likelihood of a Petition of Concern should there be a perception that human rights protections are being undermined.</p>
<p>Question 22 (see in particular the submission from Dr Conall Mallory, Appendix E)</p>	<p>A state-based settlement of the challenges posed by the extraterritorial application of the ECHR is unnecessary and would prove unpopular with European counterparts. It is difficult to see how to government could convince European partners to adopt a new protocol on this issue. It would be unnecessary as the, once unstable, jurisprudence of the ECtHR, has become considerably clearer in recent years. Moreover, the ECtHR has demonstrated it is receptive to both the representations of states and their concerns on extraterritorial obligations; dialogue is working. It would be unpopular as similar suggestions to address the norm-conflict between international human rights and humanitarian law have not received support from European counterparts, many of whom will be conscious of their human rights obligations under UN treaties. The Government should continue to engage in productive dialogue with the ECtHR and focus on demonstrating efforts to uphold the Convention when acting abroad.</p>
<p>Question 25 (see in particular the submission from Dr Vicky Kapogianni, Appendix F)</p>	<p>The current enforcement process of removing failed asylum seekers, as well as those who enter the UK through safe and legal routes but overstay their right to remain, can be complex and may raise several human rights issues. It is important to afford the opportunity for an irregular migrant to present any claims for leave to enter or remain on human rights grounds. Individuals must be allowed a reasonable opportunity to access legal advice and have recourse to justice. Notice of the decision given to remove an individual should disclose removal details to enable the affected person to challenge the decision and thus to give an effective right of redress.</p>

	<p>The practice of pushbacks would likely be incompatible with the UK’s obligations under international human rights and maritime law. UK-French cooperation has been normalised, at several instances, through a series of bilateral agreements. Evidently, both UK and French authorities need to cooperate to safeguard lives within the Channel taking all reasonable actions to protect the right to life at sea by implementing a legal and operational framework which guarantees that those in distress at sea are rescued. To tackle the impediments arising from the UK’s international obligations, ECHR and the HRA, an individualised assessment is required to ensure that a refugee will not be refouled to face persecution or human rights abuses.</p>
<p>Question 29 (see in particular the submission from Dr Tanya Krupiy, Appendix B)</p>	<p>The forum wishes to draw to the attention of the government to individuals who experience human rights violations in the context of the use of artificial intelligence technology used during a stage of the decision-making process. In such circumstances, individuals are likely to face great difficulty and/or be unable to satisfy the admissibility test. Individuals who have protected characteristics under the Equality Act 2010 will experience additional hurdles in bringing a claim in the context of the deployment of artificial intelligence during the decision-making process. There may be various degrees of correspondence between the input variable which an artificial intelligence system uses to perform a task and the possession of a protected characteristic. Yet, there will be many cases where it is impossible to prove how the use of a particular input variable was connected to the possession of a protected characteristic. This is exacerbated by the fact that emergent and unpredictable effects occur due to the various stages involved in processing the data interacting. As a result, individuals will find it very difficult to prove that discrimination occurred in the digital context. By requiring individuals to demonstrate “significant disadvantage” in order to be able to bring a claim, the government is precluding individuals from obtaining redress for discrimination in the context where the prohibited conduct took place in the context of the deployment of artificial intelligence technology.</p>

Appendix A: Dr H el ene Tyrrell

I. Respecting our common law traditions and strengthening the role of the Supreme Court

Interpretation of Convention rights: section 2 of the Human Rights Act

Question 1: We believe that the domestic courts should be able to draw on a wide range of law when reaching decisions on human rights issues. We would welcome your thoughts on the illustrative draft clauses found after paragraph 4 of Appendix 2, as a means of achieving this.

1. Domestic courts are already able to draw on a wide range of law when reaching decisions on human rights issues. The duty in s2 HRA to ‘take into account’ any relevant jurisprudence of the European Court of Human Rights does not prohibit courts from also taking into account other sources of authority.
2. Data from the first eight years of the UK Supreme Court’s cases shows that the Court makes frequent reference to the jurisprudence of foreign domestic courts: of the 533 cases handed down by the Supreme Court between 2009-2017, 152 can be described as human rights cases and explicit citations of decisions from foreign domestic courts can be found in 57 of those (38%).¹ Most references are also already drawn from common law jurisdictions – particularly Australia, the United States and Canada. The HRA does not prevent this type of comparative exercise.²
3. It is suggested in the consultation document that reference to a broader range of law would “help to mitigate the incremental expansion of rights driven by the Strasbourg Court”. This aim is not necessarily achieved by decoupling the UK courts from the Strasbourg jurisprudence. Directing courts to give greater weight to a wider range of law may simply provide a different avenue for the expansion of rights. Further, close adherence to the Strasbourg jurisprudence has also been a way that the courts have justified limiting their readings of certain rights.³
4. Careful consideration of the Convention principles in domestic courts makes it less likely that the Strasbourg Court would make adverse findings against the UK in a subsequent case on that point: see for example the line of cases starting with *Ostendorf v Germany*.⁴
5. There may be a need for claimants to press UK courts to look at Convention rights if there is a chance that the case could be taken to the Strasbourg Court. In *Lee v UK* the claimants were told that their application to Strasbourg was inadmissible because the argument in UK courts had relied solely on domestic law.⁵

The position of the Supreme Court

Question 2: The Bill of Rights will make clear that the UK Supreme Court is the ultimate judicial arbiter of our laws in the implementation of human rights. How can the Bill of Rights best achieve this with greater certainty and authority than the current position?

¹ H el ene Tyrrell, *UK Human Rights Law and the Influence of Foreign Jurisprudence* (Hart 2018).

² eg *R v Horncastle* [2009] UKSC 14, Annex 1, in which Lord Mance contributed a detailed analysis of the relevant jurisprudence of foreign domestic courts.

³ *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56.

⁴ *Ostendorf v Germany* (2015) 34 BHRC 738; *R (Hicks) v Commissioner of Police for the Metropolis* [2017] UKHL 9; *EisemanRenyard v United Kingdom* (2019) 68 EHRR SE12.

⁵ *Lee v United Kingdom* App no 18860/19 (ECtHR, 6 January 2022).

6. The UK Supreme Court is already the ultimate judicial arbiter of UK laws in the implementation of human rights. Section 2 Human Rights Act 1998 requires domestic courts to 'take into account' relevant Strasbourg case law when making determinations in human rights cases but does not require domestic courts to follow the Strasbourg case law.

Question 15: Should the courts be able to make a declaration of incompatibility for all secondary legislation, as they can currently do for Acts of Parliament?

7. Courts are already able to make declaratory orders in respect of secondary legislation. It is unnecessary to extend the discretion to make declarations of incompatibility and courts should certainly not be limited to making declarations of incompatibility in respect of secondary legislation that cannot be read compatibly with Convention rights.
8. A very large body of secondary legislation is made by the executive each year and is subject to much less parliamentary scrutiny than primary legislation. Judicial supervision is especially important where there is limited opportunity for legislative scrutiny.
9. This proposal would limit the ability of courts to provide remedies for violations of Convention rights. A declaration of incompatibility is discretionary: it triggers a power, rather than a duty, for a government minister to amend incompatible legislation.
10. The proposal would make the treatment of secondary legislation different depending on whether a case was argued on human rights grounds or on ordinary public law principles. It would be a strange outcome if secondary legislation violating human rights could not be quashed while secondary legislation which runs into unlawfulness based on ordinary public law principles could be.
11. The devolution legislation makes compatibility with Convention rights a limit to legislative competence.⁶ Restricting courts to a declaration of incompatibility in respect of secondary legislation would raise the status of secondary legislation made by Ministers in Westminster above the status of purportedly primary legislation passed by the devolved legislatures.

Question 16: Should the proposals for suspended and prospective quashing orders put forward in the Judicial Review and Courts Bill be extended to all proceedings under the Bill of Rights where secondary legislation is found to be incompatible with the Convention rights? Please provide reasons.

12. There may be a case for adding to (rather than substituting) the remedial options available to courts. The availability of suspended and prospective quashing orders would recognise the fact that third parties may rely on delegated legislation and that the consequences of quashing such legislation may be significant. Nevertheless, the courts are already careful in such cases. A quashing order is a discretionary power and courts already can and do sometimes choose to make a declaratory order in respect of secondary legislation, leaving it to the government to exercise judgement about the best way to respond.

⁶ Scotland Act 1998, s28(2)(d); Government of Wales Act 2006, s94(6)(c); Northern Ireland Act 1998, s6(2)(c).

Appendix B: Dr Tanya Krupiy

II. Restoring a Sharper Focus on Human Rights Cases

A permission stage for human rights cases

Question 8: Do you consider that a condition that individuals must have suffered a ‘significant disadvantage’ to bring a claim under the Bill of Rights, as part of a permission stage for such claims, would be an effective way of making sure that courts focus on genuine human rights matters? Please provide reasons.

Question 9: Should the permission stage include an ‘overriding public importance’ second limb for exceptional cases that fail to meet the ‘significant disadvantage’ threshold, but where there is a highly compelling reason for the case to be heard nonetheless? Please provide reasons.

Question 29: We would like your views and any evidence or data you might hold on any potential impacts that could arise as a result of the proposed Bill of Rights. In particular:

- a. What do you consider to be the likely costs and benefits of the proposed Bill of Rights? Please give reasons and supply evidence as appropriate.**
- b. What do you consider to be the equalities impacts on individuals with particular protected characteristics of each of the proposed options for reform? Please give reasons and supply evidence as appropriate.**
- c. How might any negative impacts be mitigated? Please give reasons and supply evidence as appropriate.**

(Question 29 is considered here in relation specially to questions 8 and 9)

1. The UK government proposes to introduce an admissibility test which would require claimants to prove that they suffered a “significant disadvantage” in order to have their case considered by the court.¹ This proposal would inhibit the ability of the government to achieve its objectives associated with replacing the Human Rights Act 1998 with the Bill of Rights.
2. Moreover, this proposal significantly undermines the protection of fundamental rights by precluding access to justice. The UK government explained that it aims to continue the UK tradition of upholding human rights and to maintain leadership in this area.² One of the ways in which it will achieve this aim is by providing “a sharper focus on protecting fundamental rights.”³ The government emphasises that the law should protect individuals who have “genuinely suffered from human rights” breaches.⁴ A related goal is to “restore public confidence” in safeguarding the fundamental rights.⁵ The government will maintain public confidence in the administration of justice by

¹ Ministry of Justice, ‘Human Rights Act Reform: A Modern Bill of Rights: A consultation to reform the Human Rights Act 1998’ (CP 588, 2021) , [221]-[222].

² *ibid*, 3.

³ *ibid*, [8].

⁴ *ibid*, [219].

⁵ *ibid*, 4.

precluding the claimants from bringing “frivolous” or spurious” cases.⁶ Numerous experts noted that the introduction of the proposed admissibility test will create difficulty and hardship for individuals to vindicate their human rights. The former head of the Government Legal Service Jonathan Jones said in an interview to Alex Dean that people will find it harder to bring a claim.⁷ Consequently, they will be discouraged from bringing a claim to the court.⁸ Similarly, Frances Webber of Warwick University⁹ expressed a concern that it will be very expensive for individuals to bring a claim due to having to satisfy the admissibility test.¹⁰

3. The present author concurs that the requirement that the claimant suffered a “significant disadvantage” creates a barrier for individuals who suffered serious violations of human rights to have their case adjudicated due to introducing an onerous evidentiary burden on the claimant. In particular, individuals who experience human rights violations in the context of the use of artificial intelligence technology during a stage of the decision-making process are likely to face great difficulty or to be unable to satisfy the admissibility test.
4. Individuals who have protected characteristics under the Equality Act 2010 will experience additional hurdles in bringing a claim in the context of the deployment of artificial intelligence during the decision-making process. This issue is particularly salient in light of the fact that the government formulated a strategic priority in 2017 to create conditions for the growth of the artificial intelligence industry in the United Kingdom.¹¹ The fact that individuals with protected characteristics will face additional hurdles in bringing a claim in the context of the employment of artificial intelligence technology during any stage of the decision-making process is significant. In formulating the proposal to introduce the admissibility test using the Bill of Rights the government wished to advance its commitment to eliminate discrimination and to advance equality of opportunity.¹² The introduction of the admissibility test which requires proof of “significant disadvantage” is incompatible with this commitment.
5. Claimants with protected characteristics will find it extremely challenging to prove that their human rights had been violated where the decision-makers use artificial intelligence technology as part of a decision-making process even in the absence of an admissibility test. There may be various degrees of correspondence between the input variable which an artificial intelligence system uses to perform a task and the possession of a protected characteristic.¹³ Yet, there will be many cases where it is impossible to prove how the use of a particular input variable was connected to the possession of a protected characteristic.¹⁴ This is exacerbated by the fact that emergent

⁶ *ibid*, [219].

⁷ Alex Dean, ‘Your rights are at risk’ (Prospect, 27 January 2022)

<<https://www.prospectmagazine.co.uk/politics/human-rights-act-at-risk-dominic-raab-review>> accessed 8 March 2022.

⁸ *ibid*.

⁹ Frances Webber (Institute of Race Relations) <<https://irr.org.uk/author/?frances-webber>> accessed 8 March 2022

¹⁰ (n 7)

¹¹ Department for Digital, Culture, Media & Sport, ‘Executive summary: Our Plan for Britain’ (Gov.uk, 1 March 2017) <<https://www.gov.uk/government/publications/uk-digital-strategy/executive-summary>> accessed 8 March 2022.

¹² (n 1) page 104, para 10

¹³ Tetyana (Tanya) Krupiy, ‘Meeting the Chimera: How the CEDAW Can Address Digital Discrimination’ (2021) 10(1) *International Human Rights Law Review* 1, 13.

¹⁴ *ibid*.

and unpredictable effects occur due to the various stages involved in processing the data interacting.¹⁵ As a result, individuals will find it very difficult to prove that discrimination occurred in the digital context.

6. By requiring individuals to demonstrate “significant disadvantage” in order to be able to bring a claim, the government is precluding individuals from obtaining redress for discrimination where the prohibited conduct took place in the context of the deployment of artificial intelligence technology. Similar barriers to access to justice exist when individuals who do not have protected characteristics allege that a violation of human rights took place in the context of the use of artificial intelligence technology. The second limb of the permission test of claimants being able to bring a claim if the matter touches on ‘overriding public importance’¹⁶ does not address this concern. Since the nature of artificial intelligence technology creates challenges to adducing proof that harm occurred, claimants will have difficulty in showing that matters of great public importance are at stake.
7. Furthermore, the phrase ‘overriding public importance’ creates a very high threshold resulting in many individuals with meritorious claims facing hurdles to accessing justice. It is recommended that the government does not require claimants to satisfy an admissibility test in order to fulfil its promise of being a leader in protecting fundamental rights.

¹⁵ *ibid*, 15.

¹⁶ (n 1) [223].

Appendix C: Dr Sean Molloy

III Preventing the incremental expansion of rights without proper democratic oversight

Respecting the will of Parliament: section 3 of the Human Rights Act

Question 12: We would welcome your views on the options for section 3.

1. The balance between Parliament and courts in the United Kingdom (UK) has been viewed as increasingly skewed, often in favour of the latter.¹ Section 3 of the Human Rights Act (HRA), 1998 is particularly important in this context. A central critique of section 3 and the primary focus of this contribution is that it undermines parliamentary sovereignty; a principle of the UK constitution by which Parliament is the supreme legal authority in the UK. To this end, the Government states that the HRA as it has been applied in practice, ‘has moved too far towards judicial amendment of legislation which can contradict, or be otherwise incompatible with, the express will of Parliament.’²
2. One immediate and now well-versed response to this challenge is that the HRA, and by implication section 3, is an expression and manifestation of parliamentary sovereignty. Thus, the act of reading legislation in Convention-compliant ways by courts is an act of deference to Parliament.³ As Richard Hermer QC noted in his oral evidence to the Joint Committee on Human Rights: “All the courts have been doing is that which Parliament has told them to do, which is to apply the Act.”⁴
3. However, it is necessary to delve further into the opposition on section 3 and to understand the parliamentary sovereignty issue in the wider context of the supranational framework that it gives effect to. The issue appears not necessarily to be that pursuant to section 3, courts must ensure that legislation is compatible with Convention rights. Rather, it is that this requirement must also be read alongside other provisions and that the accumulative effect of these provisions alongside section 3 undermines parliamentary sovereignty by the back door. For instance, section 2 HRA requires that courts consider the rulings of the European Court of Human Rights (ECtHR). Among those who lament the perceived encroachment of the ECtHR on rights protections domestically,⁵ the supposed expansive interpretation of this court has meant that the contours of rights have themselves broadened.⁶ Thus, while Parliament might well have intended that courts read legislation in Convention-compliant ways, the argument goes

¹ Andrew Moravcsik, ‘The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe’ (2000) 54(2) *International Organization* 217.

² Ministry of Justice, ‘Human Rights Act Reform: A Modern Bill Of Rights A consultation to reform the Human Rights Act 1998’ (2021 CP 588), [233]. See also House of Commons House of Lords Joint Committee on Human Rights *The Government’s Independent Review of the Human Rights Act*, para. 94

³ See Jeff King, Submission to the Independent Review of the Human Rights Act Call for Evidence <<https://www.gov.uk/guidance/independent-human-rights-act-review#call-for-evidence-responses>> accessed 8 March 2022.

⁴ Richard Hermer QC, Joint Committee on Human Rights, Oral evidence: The Government’s Independent Human Rights Act Review (HC 1161) <<https://committees.parliament.uk/oralevidence/1964/html/>> accessed 8 March 2022.

⁵ Alice Donald, Jane Gordon and Philip Leach, ‘The UK and the European Court of Human Rights’, Equality and Human Rights Commission Research report 83 <https://www.equalityhumanrights.com/sites/default/files/83_european_court_of_human_rights.pdf> accessed 8 March 2022.

⁶ See, for discussion, Conall Mallory, *Human Rights Imperialists: The Extraterritorial Application of the European Convention on Human Rights* (Hart Publishing 2020).

that it could not have envisioned that the meaning and nature of rights would have expanded in the ways they have. The potential implications of the ECtHR on the UK domestic legal system is amplified by the ability of media and politicians to characterize judgments in ways that are an affront to democracy and national interests.⁷

4. Case law would appear to provide some support for the proposition that courts are adopting readings which, while Convention compliant may nevertheless clash with the intention of Parliament. Two cases are often strategically employed to make this point. The first is that of *R v A*, a case in which the defendant was charged with rape.⁸ On appeal to the House of Lords, Lord Steyn found that section 41 of the Youth Justice and Criminal Evidence Act 1991 contravened the defendant's right to a fair trial under Article 6 of the ECHR. By adopting a wider interpretation of section 3, Lord Steyn was able to find a solution which ensured that 'section 41 will have achieved a major part of its objective' but without its 'excessive reach as reflected in section 3 of the 1998 Act'.⁹
5. Similarly, in the seminal case of *Ghaidan v Godin-Mendoza*,¹⁰ the House of Lords (now the Supreme Court) adopted a purposive approach to interpretation. In this case, a same-sex partner had lived in a stable and close relationship for many years before the death of his partner. The issue was whether a person in a homosexual relationship could inherit a statutory tenancy under the Rent Act 1977. The House of Lords held that it would be acting in contravention of Article 14 (prohibition from discrimination), and Article 8 (right to respect for private and family life) of the ECHR to deny the respondent the right to succeed under a statutory tenancy. The judges applied the ordinary meaning of the Rent Act and the words 'as his or her wife or husband' in the Act were read 'as if they were his or her wife or husband' to comply with Articles 8 and 14 of the ECHR to protect the security of tenure enjoyed by a person in a homosexual relationship. As in *R v A*, the Court in this instance sought to apply different meaning to the legislation in order to ensure that it was Convention compliant.
6. The central objection to section 3 is that, as evident in the aforementioned cases, courts are assuming roles similar to the legislature by 'making law' while lacking the democratic mandate to do so.

Reality v Rhetoric

7. When presented in the types of ways discussed above, there is arguably some basis for reforming section 3 HRA and, it follows, the two options proposed by the Government might well be of use. However, like much of the document itself, the context for the types of reforms proposed are largely baseless.
8. Firstly, there is a deliberate attempt to frame UK Courts and Parliament as being on a collision course when discussing section 3. Yet, the duty to interpret legislation compatibly with Convention rights cannot be detached from the obligations placed on

⁷ Francesca Klug, *Values for a Godless Age* (Penguin 2000) 5.

⁸ *R v A* (No2) [2002] 1 AC 45.

⁹ *ibid* [45].

¹⁰ *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

the legislature to adopt Convention compliant legislation in the first place. Indeed, referencing pre-legislative scrutiny of the Human Rights Bill, the judgement in *R v A* identifies this point in its obiter dicta:

In the progress of the Bill through Parliament the Lord Chancellor observed that "in 99% of the cases that will arise, there will be no need for judicial declarations of incompatibility" and the Home Secretary said "We expect that, in almost all cases, the courts will be able to interpret the legislation compatibility with the Convention": Hansard (HL Debates), 5 February 1998, col 840 (3rd Reading) and Hansard (HC Debates), 16 February 1998, col 778 (2nd c Reading).¹¹

Moreover, the requirement to adopt Convention compliant legislation is also expressly provided for under s. 19 HRA, 1998. This section reads that:

(1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill—

(a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights ("a statement of compatibility"); or

(b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.

(2) The statement must be in writing and be published in such manner as the Minister making it considers appropriate.

The notion that courts, in interpreting legislation in Convention-compliant ways, is an affront to parliamentary sovereignty overlooks the fact that it is often wholly logical to assume that Parliament intended for legislation to be human rights compliant.

9. Secondly, while opposition is more likely to arise in the context of legislation that predates the HRA, there is nevertheless a seemingly deliberate attempt to frame the potentially deleterious effect of section 3 in ways that overlook the limitations already placed on courts. The Government seeks to argue that section 3 has and continues to impact on parliamentary sovereignty. However, the basis for such claims typically involve reference to aforementioned cases like *R v A* and *Ghaidan*. Yet, the limitations of the interpretive power is expressly provided for under section 3. This provision states that Convention compliant interpretations are permitted as long as it is "possible" and not against the thrust of the legislation. Moreover, the willingness of the Courts to adopt a cautious approach to section 3 interpretations can be gleaned from the same cases cited. For instance, Lord Rodger in his judgment in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, as follows at [110]:

What excludes such provisions from the scope of section 3(1) is not any mere matter of the linguistic form in which Parliament has chosen to express the obligation. Rather, they are excluded because the entire substance of the provision, what it requires the public authority to do, is incompatible with the Convention.

¹¹ *R v A (No2)* (n 8) [44].

The only cure is to change the provision and that is a matter for Parliament and not for the courts.¹²

Courts have, in other words, been particularly mindful of the balance to be struck with Parliament and exerted cautiousness when engaging section 3.

10. Thirdly, while anecdotal cases can be used by those in favour of reforming section 3, case law can be as easily applied in such a way that refutes the scope of the provision. For instance, Lord Bingham in *Sheldrake v Director of Public Prosecutions* took the view that section 3 should not be used to read legislation in a manner which would be incompatible with the underlying thrust of the legislation, or would not go with the grain of it, or would call for legislative deliberation, or would change the substance of a provision completely, or would remove its pith and substance, or would violate a cardinal principle of the legislation.¹³

Moreover, recent research on the use of section 3 powers has usefully illustrated the difference in practice between the theoretical implications of section 3 on parliamentary sovereignty and the realities of it.¹⁴ In their research, Florence Powell and Stephanie Needleman found ‘relatively few cases in which s.3 was decisive to a case’s outcome.’¹⁵ They also identified that when section 3 was decisive, ‘its use, although important, was not radical with the courts being vigilant to not undermine Parliament’s intention.’¹⁶ These findings support the view expressed by the Joint Committee on Human Rights that ‘[T]he fact that it is hard to identify any cases in which Parliament has felt the need to correct a court’s interpretation of legislation under section 3 HRA strongly indicates that the courts are not using section 3 to trespass on to the territory of the legislature.’¹⁷ This is further supported by The Independent Human Rights Act Review, which concluded that there:

was a broad and strongly argued view from the evidence that there was no basis on which to amend section 3 or 4 of the HRA. There was a strongly held view that the evidence supported the conclusion that UK Courts had not abused the use of section 3 and that section 4 had been used sparingly as Parliament had intended.¹⁸

11. Fourthly, if it is accepted that opposition to section 3 must be understood in the wider context of reforming the HRA and that a significant part of this discussion is the attendant critiques of the ECtHR, it is necessary to engage with the current position of the supranational court. The risk of the ECtHR and its expansive interpretation of rights is overstated. Indeed, under the margin of appreciation, the Court has showed a level of deference to national states particularly when they weigh competing public and individual interests, in view of their special knowledge and responsibility under domestic law.¹⁹ As the case load of the ECtHR continues to increase, it is likely that

¹² See also Lord Nicholls, *ibid.*, [32]–[33].

¹³ *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43, [28].

¹⁴ See Florence Powell and Stephanie Needleman, ‘How radical an instrument is Section 3 of the Human Rights Act 1998?’, U.K. Const. L. Blog (24 March 2021) (available at <https://ukconstitutionallaw.org/>)

¹⁵ *ibid.*

¹⁶ *ibid.*

¹⁷ Joint Committee on Human Rights ‘The Government’s Independent Review of the Human Rights Act’ (HC 2021-22 89) [105].

¹⁸ The Independent Human Rights Act Review [118]

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf> accessed 8 March 2022.

¹⁹ See, for example, *Brannigan & McBride v UK* (1993); *Hatton v UK* (2003); *Evans v UK* (2007).

such deference will only increase. Moreover, some identify that even where the ECtHR might be interpreted as activist, UK courts have ‘demonstrated a willingness to (mis)read ECHR rights, as explained in ECHR jurisprudence, to preserve traditional approaches.’²⁰

Conclusion

12. The case for reforming section 3 mirrors much of the Governments proposals in that they are based on theoretical problems rather than realized issues. There is no basis for reforming section 3 of the HRA. The presentation of two options for reform rests on an initial acceptance of the problems posed by the provision. By framing section 3 as problematic, the government intends to move the conversation onto the merits or limitations of the proposed amendments. However, the foundations for reform are not substantiated. On the contrary, the JCHR, Independent Review of the HRA and a range of scholars all refute the basis upon which the proposed reforms are made.

²⁰ David Bonner, Helen Fenwick, and Sonia Harris-Short, ‘Judicial Approaches to the Human Rights Act’, (2003) 52(3) *International and Comparative Law Quarterly* 549, 585.

Appendix D: Colin Murray

III Preventing the incremental expansion of rights without proper democratic oversight

Application to Wales, Scotland and Northern Ireland

Question 19: How can the Bill of Rights best reflect the different interests, histories and legal traditions of all parts of the UK, while retaining the key principles that underlie a Bill of Rights for the whole UK?

1. Two legislative regimes have been used to make elements of the ECHR operative within the domestic legal systems of the UK: the Human Rights Act 1998 and the devolution statutes. The Human Rights Act imposes obligations upon public authorities across the UK to uphold ECHR rights and, with regard to primary legislation passed by Westminster, permits the courts to engage in special interpretation processes or to declare that an incompatibility exists between the legislation and ECHR rights. The devolution legislation, however, imposes more stringent human rights obligations upon devolved institutions; it is outside the competence of the devolved legislatures²¹ and beyond the powers of the devolved administrations²² to act in a way which is incompatible with the ECHR rights incorporated through the Human Rights Act.
2. This response focuses on the specific implications of the Bill of Rights Consultation for Northern Ireland, where the Belfast/Good Friday Agreement 1998 provides the basis for a peaceful and democratic governance affirmed by the people of Northern Ireland in a referendum. Whereas the Northern Ireland conflict was characterised by flagrant human rights abuses, a key UK commitment within the 1998 Agreement's Rights, Safeguards and Equality of Opportunity provisions was to incorporate the ECHR into Northern Ireland law and to ensure 'direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency'.²³ The extent of the human rights obligations upon the power-sharing institutions in Northern Ireland is thus not purely an outworking of human rights obligations resting upon the state as a matter of international law, it was explicitly envisaged as a specific restriction on devolved competences in Northern Ireland to foreground human rights in the work of Northern Ireland's institutions after 1998.
3. Under the Rights, Safeguards and Equality of Opportunity section of the Agreement provision was also made for the drafting of a Bill of Rights for Northern Ireland to build a unique arrangement beyond the baseline of existing protections. Notwithstanding repeated initiatives, this has not been realised. The Human Rights Act, in its application to Northern Ireland, and the human rights provisions of the Northern Ireland Act 1998, have nonetheless long been regarded as the basis for meeting these commitments under the 1998 Agreement. The 1998 Agreement's provisions for a special range of rights and equalities protections had a significant impact upon negotiations over the UK's withdrawal from the EU; the UK had to make specific commitments preventing diminution of rights and equality protections in Northern Ireland law as a result of Brexit.²⁴ It is therefore not

²¹ Scotland Act 1998, s. 29(2)(d); Government of Wales Act 2006, s. 108A(2)(e); Northern Ireland Act 1998, s. 6(2)(c).

²² Scotland Act 1998, s. 57(2); Government of Wales Act 2006, s. 58A(7) and (8); Northern Ireland Act 1998, s. 24(1)(a).

²³ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes) (1998) 2114 UNTS 473, Multi-Party Agreement, Rights, Safeguards and Equality of Opportunity, para. 2.

²⁴ *Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union* (30 January 2020) UKTS 3/2020, Protocol on Ireland/Northern Ireland, Art. 2.

possible to restrict the operation of these measures within Northern Ireland law without calling into question the UK's commitments under the 1998 Agreement.

4. The 1998 Agreement commits the UK to the incorporation of the ECHR into Northern Ireland law. The substance of this commitment is important, not its fulfilment through the vehicle of the Human Rights Act. This Act could be repealed and replaced with a measure which fulfils a comparable level of rights protection in Northern Ireland without breaching the UK's commitments. It is therefore vital to assess the substance of the proposals. The Consultation proposals involve retaining, and in some regards augmenting, the ECHR rights as currently incorporated. The proposed addition of a right to jury trial, for example, raises important issues in the context of Northern Ireland, where restrictions of trial by jury have long been a prominent and controversial feature of security legislation. The framing of a right to trial by jury applicable 'insofar as trial by jury is prescribed by law in each jurisdiction'²⁵ risks doing little more than flag up the existing disparity in the operation of this concept across the UK.
5. The Consultation proposals, moreover, focus upon weakening the powers of the courts with regard to the application of ECHR rights in the context of Westminster legislation (primary and secondary) and the duties which are currently placed upon public authorities, and to restrict the extent to which they draw upon European Court of Human Rights jurisprudence. The suggested options for the replacement of section 3 of the Human Rights Act restrict an already limited power to remedy breaches of the incorporated ECHR rights to such an extent that it undermines the role of the courts set out in the 1998 Agreement.
6. The options for replacing the section 2 duty to have regard for Strasbourg case law are both predicated on an understanding that the rights contained in the Modern Bill of Rights will not 'necessarily be the same as the meaning of a corresponding right in the European Convention on Human Rights', the first option being explicit in this regard.²⁶ This is at variance with promises to incorporate the ECHR contained within the 1998 Agreement. The Northern Ireland courts would no longer be assessing whether legislation and public authority activity are ECHR compliant. Carrying through such proposals would substantially weaken human rights protections within the law of Northern Ireland, to the point where a Modern Bill of Rights enacted on this basis could no longer be said to fulfil the requirements of the 1998 Agreement.²⁷
7. The scope of the obligations upon the devolved institutions contained in the devolution legislation is explicitly connected to the ECHR rights as incorporated by the Human Rights Act.²⁸ Any modification of that Act therefore requires amendments to the devolution legislation which would ordinarily require Legislative Consent Motions to be passed in the devolved legislatures. In the Northern Ireland context, this would raise particular difficulties in terms of the likelihood of a Petition of Concern should there be a perception that human rights protections were being undermined.²⁹

²⁵ Ministry of Justice, 'Human Rights Act Reform: A Modern Bill Of Rights. A consultation to reform the Human Rights Act 1998' (2021 CP 588, [203].

²⁶ *ibid*, Appendix 2.

²⁷ See C. Murray, A. O'Donoghue and B. Warwick, 'The Implications of the Good Friday Agreement for UK Human-Rights Reform' (2016-2017) 11-12 *Irish Yearbook of International Law* 71, 85.

²⁸ See, for example, the Northern Ireland Act 1998, s. 98(1).

²⁹ See C. Murray, A. O'Donoghue and B. Warwick, 'The Implications of the Good Friday Agreement for UK Human-Rights Reform' (2016-2017) 11-12 *Irish Yearbook of International Law* 71, 86-87.

Appendix E: Dr Conall Mallory

III Preventing the incremental expansion of rights without proper democratic oversight

Extraterritorial Jurisdiction

Question 22 Given the above, we would welcome your views on the most appropriate approach for addressing the issue of extraterritorial jurisdiction, including the tension between the law of armed conflict and the Convention in relation to extraterritorial armed conflict.

1. A state-based settlement of the challenges posed by the extraterritorial application of the ECHR is unnecessary and would prove unpopular with European counterparts. The Government should continue to engage in productive dialogue with the ECtHR and focus on demonstrating how effort is made to uphold the Convention when acting abroad.

Unnecessary:

2. The government's case, supported by the IHRAR, is that there is troubling uncertainty in the extraterritorial obligations owed by Contracting Parties to the ECHR. This is no longer the case. The ECtHR has consistently applied the framework it articulated in the 2011 judgment of *Al-Skeini v United Kingdom*, which divides the extraterritorial application of the Convention into two categories: when a state exercises effective control of a territory, and where a state agent exercises authority and control over an individual.¹ There remain outstanding areas for clarification, particularly relating to the investigative obligations under Article 2 in light of *Hannan v Germany*² and *Guzelyurtlu v Turkey and Cyprus*.³ But these issues can be resolved judicially, rather than requiring state intervention.
3. When extraterritorial obligations arise judges at both the ECtHR and in domestic courts have taken account of the, sometimes challenging, circumstances faced by the state operating abroad. For instance, in *Jaloud v Netherlands*, the Court was willing to make reasonable allowances for the difficult conditions under which investigators had to work in fulfilling the Article 2 investigative obligation. It particularly focused on the location, the post-conflict context, language challenges and the hostile elements investigators faced.⁴ The Court has also demonstrated a willingness to address the concerns of state parties. In *Hassan v United Kingdom*, at the request of the UK government, the Grand Chamber interpreted Article 5 against the background of the provisions of international humanitarian law.⁵ In *Smith v Ministry of Defence*, the majority in the Supreme Court adopted a very narrow 'middle-ground' of when the state would be in violation of the right to life relating to soldiers, excluding both political/strategic decisions and individual errors on the battlefield.⁶
4. The Court has also demonstrated that the bounds of extraterritorial jurisdiction are not endless. In *Georgia v Russia (II)* decision of 2021 the Court rejected the argument

¹ *Al-Skeini and Others v the United Kingdom* App no 55721/07 (ECtHR, 7 July 2011).

² *Hanan v Germany* App no 4871/16 (ECtHR, 16 February 2021).

³ *Güzelyurtlu and Others v Cyprus and Turkey* App no 36925/07 (ECtHR, 29 January 2019).

⁴ *Jaloud v the Netherlands* App no 47708/08 (ECtHR, 20 November 2014) [226] – [227].

⁵ *Hassan v United Kingdom* App no 29750/09 (ECtHR, 16 September 2014).

⁶ *Smith v Ministry of Defence* [2013] UKSC 41 [76] (Lord Hope).

that jurisdiction extended to the ‘active phase’ of military operations.⁷ In *MN v Belgium*, the Court rejected an application that extraterritorial jurisdiction extended to asylum applications made to the Belgian Consulate in Beirut.⁸

5. The government’s current approach of dialogue with the Court, and making third party interventions, is paying dividends. British representations played a pivotal role in the *Hassan* decision. The UK government, alongside some European counterparts, have also had success as third-party interveners. The United Kingdom led a delegation of states in *MN v Belgium*.⁹ Elsewhere, France, Italy and Belgium had all made an influential intervention in the asylum case of *ND and NT v Spain*, in effect overturning a Chamber decision where a violation had been found.¹⁰

Unpopular:

6. There does not appear to be appetite for the wholesale changes suggested by the government or the IHRAR. It should be noted that at the Copenhagen Conference in 2018, an attempt had been made to insert a provision into the Draft Declaration which would explore the syphoning-off of cases which related to the tensions between human rights and international humanitarian law.¹¹ The proposal was heavily edited in the subsequent conference proceedings with the resulting text notably reflecting the importance afforded to the Court on this issue, calling for states to explore ways to handle conflict cases ‘without thereby limiting the jurisdiction of the Court’.¹² With four years of relatively restrictive interpretations of jurisdiction made by the Court since, it is difficult to see how such a state-based settlement would be any more popular now than it was then.
7. It should also be borne in mind that many of the 47 parties to the ECHR do not project their foreign policy in the same muscular manner as the UK, and therefore do not experience the tensions between military affairs and human rights obligations to the same extent. Moreover, Council of Europe members who, like the UK, are also signatories to UN treaties, in particular the International Covenant on Civil and Political Rights and Convention on the Rights of the Child, will have noted that the ECHR position on extraterritorial jurisdiction is already interpreted in a more conservative manner.¹³ There may then be little appetite to agree to lower the standard of obligation in the European human rights regime, when states will contemporaneously be expected to uphold higher standards within the UN framework.

⁷ *Georgia v Russia [III]* App no 38203/68 (ECtHR, 21 January 2021) [126].

⁸ *MN and Others v Belgium* App no 3599/18 (ECtHR, 5 March 2020).

⁹ *ibid.*

¹⁰ *ND and NT v Spain* App nos 8675/15 and 8697/15 (ECtHR, 13 February 2020).

¹¹ Draft Copenhagen Declaration, (5 Feb 2018)

<https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/nyheder/draft_copenhagen_declaration_05.02.18.pdf> accessed 7th March 2022.

¹² Council of Europe, ‘Copenhagen Declaration’

<https://www.echr.coe.int/Documents/Copenhagen_Declaration_ENG.pdf> accessed 7th March 2022.

¹³ See for instance: *A.S. and others v. Malta* UN Doc CCPR/C/128/D/3043/2017; Human Rights Committee, ‘General Comment No 36’; A Callamard and F Ni Aoláin, ‘Legal Analysis: Extra-territorial jurisdiction of States over children and their guardians in camps, prisons, or elsewhere in the northern Syrian Arab Republic’ <www.ohchr.org/Documents/Issues/Executions/UNSRsPublicJurisdictionAnalysis2020.pdf> accessed 7th March 2022.

Appendix F: Dr Vicky Kapogianni

III Preventing the incremental expansion of rights without proper democratic oversight

Illegal and irregular migration

Question 25: While respecting our international obligations, how could we more effectively address, at both the domestic and international levels, the impediments arising from the Convention and the Human Rights Act to tackling the challenges posed by illegal and irregular migration?

1. The UK's asylum system is based on its long-standing commitments as a signatory party to the 1951 Convention relating to the Status of Refugees and 1967 Protocol (Refugee Convention). Protection to those seeking asylum in the UK, is also afforded by the European Convention on Human Rights (ECHR) incorporated into domestic law via the Human Rights Act 1998 (HRA). A number of ECHR provisions and other international human rights treaties related to the refugee cause are binding on the UK including but not limited to Article 2 ECHR (the right to life), Article 3 ECHR (prohibition of torture), Article 6 ECHR (right to a fair trial), Article 13 ECHR (the right to an effective remedy), Article 13 ICCPR (the right to access to justice in immigration decisions, Article 4 of Protocol 4 ECHR (the prohibition on the collective expulsion of aliens) and Article 3 of the UN Convention on the Rights of the Child. The UK is also bound by other international treaties that apply in the context of life at sea such as the UN Convention on the Law of the Sea 1982 (UNCLOS) and the duty to render assistance (Article 98 UNCLOS)¹⁴ and the International Convention on Salvage 1989¹⁵ (Article 10 of the Salvage Convention) among others.
2. Considering first the removal of failed asylum seekers and those who enter the UK through safe and legal routes but overstay their right to remain, the current enforcing process can be complex and can raise a number of human rights issues. It is, therefore, important to afford the opportunity for an irregular migrant to present any claims for leave to enter or remain on human rights grounds. Section 10 of the Immigration and Asylum Act 1999, states implicitly that an irregular migrant must have an appropriate opportunity to show that he is entitled to remain in the UK, prior to being removed.¹⁶ Section 77 of the 2002 Act and paragraph 329 of the Immigration Rules provide that while a person's claim for asylum is pending, removal action cannot take place¹⁷ or require the departure of the asylum applicant or their dependants.¹⁸ Where individuals' immigration claim or appeal is unsuccessful, section 10 of the immigration and Asylum Act 1999 provides that they will be given a 'notice of liability for removal'.¹⁹ The 'Judicial Reviews and Injunctions' (JRI) policy gives guidance on notice periods, removal windows and the judicial review process in enforcement cases. The current JRI

¹⁴ United Nations Convention on the Law of the Sea (signed 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS) art 98.

¹⁵ International Convention on Salvage (adopted 28 April 1989, entered into force 14 July 1996) 1953 UNTS 165 art 10.

¹⁶ Immigration and Asylum Act 1999, s 10.

¹⁷ Nationality, Immigration and Asylum Act 2002, pt 4, s 77 (1) and (2).

¹⁸ 'Immigration Rules', [329] (*Home Office*, 25 Feb 2017) <<https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-11-asylum>> accessed 22 January 2022.

¹⁹ Home Office, 'Judicial reviews and injunctions' (22 April 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/979820/judicial-reviews-chapter-60-v21.0.pdf> accessed 5 February 2022.

policy confirms that the notice period is set to 72 hours, including at least two working days, but five days in third country and non-suspensive appeals (NSA) cases.²⁰ Clause 45 of the Nationality and Borders Bill recommends a statutory guarantee of at least five working days before a person is removed, to afford an opportunity to take legal advice and to challenge the removal according to the constitutional right of access to justice, as guaranteed by the fundamental principles of common law²¹ and Article 13 ECHR²² as well as Article 13 of the ICCPR.

3. Therefore, individuals must be allowed a reasonable opportunity to access legal advice and have recourse to justice. Notice of the decision given to remove an individual should disclose removal details such as date and time of removal, to enable the affected person to challenge the decision and thus to give an effective right of redress.²³ As stressed, the decision-making process is far from faultless, and an incorrect decision may well be made.²⁴ The implications of an incorrect decision may severely impact those individuals whose claim is based on refugee status or a risk of a serious human rights breach if they are returned, such as a violation of Article 2 or Article 3 ECHR.²⁵ Furthermore, as UNHCR stressed for those without a legal right to remain in the UK, a quicker decision followed by a timely return or transfer, limits chances for new family or further ties to be forged which might create legal barriers, for instance, under Article 8 ECHR, during removals.²⁶
4. On the challenges posed by illegal migration, in particular, for those travelling via small boats across the channel to the UK,²⁷ the UK is bound, under maritime law, to take positive actions and organise and deliver an effective search and rescue service to protect and save lives at sea. Enabling maritime enforcement to practice pushbacks²⁸ would likely be incompatible with the UK's obligations under international human rights and maritime law. Pushbacks endanger lives at sea, even more so when it involves people on small, unseaworthy vessels, without appropriate life-saving equipment as is the case for migrants in small boats in the Channel.

²⁰ *ibid*, 14.

²¹ *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36 [26] (Lord Steyn), [2004] 1 AC 604.

²² *De Souza Riberiro v France* App no 22689/07 (ECtHR, 13 December 2012), [47].

²³ *R (on the application of FB(Afghanistan)) v Secretary of State for the Home Department* [2020] EWCA Civ 1338 [77].

²⁴ BBC News, 'Serious flaws' in UK immigration system, Law Society warns' (*BBC News*, 12 April 2018) <<https://www.bbc.co.uk/news/uk-politics-43737542>> accessed 11 February 2022; [2019] UKUT HU/20001/2018 (IAC); *AZ (error of law: jurisdiction; PTA practice) Iran* [2018] UKUT 245 (IAC); *AAR (OLF – MB confirmed) (CG) Ethiopia* [2022] UKUT 00001 (IAC).

²⁵ *De Souza Riberiro v France* App no 22689/07 (ECtHR, 13 December 2012), [48].

²⁶ The UN Refugee Agency, 'UNHCR's Guide to Asylum Reform in the United Kingdom' (*UNHCR*, 23 February 2021) <<https://www.unhcr.org/uk/609123ed4.pdf>> accessed 13 February 2022; see also, *Rhuppiah (Appellant) v Secretary of State for the Home Department (Respondent)* [2018] UKSC 58.

²⁷ Dominic Casciani, 'Channel migrants: What happens to people crossing to the UK?' (*BBC News*, 26 November 2021) <<https://www.bbc.co.uk/news/explainers-53734793>> accessed 8 March 2022; Melissa Macdonald, 'Migrants crossing the English channel' (*House of Commons Library*, 4 November 2019) <<https://commonslibrary.parliament.uk/migrants-crossing-the-english-channel/>> accessed 2 February 2022.

²⁸ Pushbacks have been described as various measures, actions or policies taken by States, sometimes involving third countries or non-State actors, which result in migrants, including asylum seekers, being forced back without an individual assessment in line with human rights obligations and due process guarantees, to the country or territory, or to sea, from where they attempted to cross or crossed an international border. A/HRC/47/30 (12 May 2021), [34]-[36].

5. UK-French cooperation has been normalised, at several instances, through a series of bilateral agreements.²⁹ Evidently, both UK and French authorities need to cooperate to safeguard lives within the Channel taking all reasonable actions to protect the right to life at sea³⁰ by implementing a legal and operational framework which guarantees that those in distress at sea are rescued. To tackle the impediments arising from the UK's international obligations, ECHR and the HRA, an individualised assessment is required to ensure that a refugee will not be refouled to face persecution or human rights abuses.³¹ Pushback practices on vessels prohibiting those on board from seeking asylum in the UK may ensue in violating the 1951 Convention, 1948 UNDHR and ECHR, namely, Articles 2,3,4,5,6 and 14.³² While agreements between countries regarding who should be processing asylum claims may be lawful, a failure to conduct an individual assessment to establish whether the individual in question can return to any country, such as France or any other, and have access to procedures and standards of treatment may result in breaching the Convention's requirements or individual's human rights.³³ Therefore, As Rosella Pagliuchi-Lor, UK Representative at United Nations High Commissioner for Refugees, stressed 'it would be beneficial for the UK to have a formal agreement with the EU to determine the best way to ensure that everyone has access to decent asylum somewhere, ideally where it makes the most sense'.³⁴

²⁹ Protocol Concerning Frontier Controls and Policing, Co-operation in Criminal Justice, Public Safety and Mutual Assistance Relating to the Channel Fixed Link (UK-France) (adopted 25 November 1991, entered into force 2 August 1993) [1993] UKTS 70; Agreement concerning the carrying of Service Weapons by French Officers on the territory of the United Kingdom of Great Britain and Northern Ireland (UK-France) (adopted 4 February 2003, entered into force 10 March 2005) [2005] UKTS 28; Treaty Concerning the Reinforcement of Cooperation for the Coordinated Management of their Shared Border (UK-France) (adopted 18 January 2018, entered into force 1 February 2018) [2018] UKTS 1.

³⁰ Home Office, Border Force and The Rt Hon Sajid Javid MP, 'UK and France sign action plan to tackle small boat crossings' (*Gov.uk*, 24 January 2019) < <https://www.gov.uk/government/news/uk-and-france-sign-action-plan-to-tackle-small-boat-crossings> > accessed 12 February 2022.

³¹ *Sharifi and Others v Italy and Greece* App no 16643/09 (ECtHR, 21 October 2014).

³² UK Parliament, 'Written evidence from Justice Studio (NBB0034), Legislative Scrutiny: Nationality and Borders Bill' (3 November 2021) < <https://committees.parliament.uk/writtenevidence/39310/html/> > accessed 10 February 2022.

³³ Joint Committee on Human Rights, 'Legislative Scrutiny: Nationality and Borders Bill (Part 3) – Immigration offences and enforcement' (2021-2022, HL 112, HC 885), [67] < <https://committees.parliament.uk/publications/8021/documents/83303/default/> > accessed 13 February 2022,

³⁴ Joint Committee on Human Rights, 'Oral evidence: Legislative Scrutiny: Nationality and Borders Bill' (HC 588, 20 October 2021) < <https://committees.parliament.uk/oralevidence/2849/pdf/> > accessed 15 February 2022, 8.

Appendix G: List of forum members who contributed to and/or support this response

Professor Kathryn Hollingsworth

Dr Vicky Kapogianni

Dr Tanya Kruipy

Dr Conall Mallory

Dr Sean Molloy

Colin Murray

Professor Rhona Smith

Dr H el ene Tyrrell